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SERVICE DATE – MAY 31, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-307 (Sub-No. 6X)

WYOMING AND COLORADO RAILROAD COMPANY, INC. — ABANDONMENT EXEMPTION—IN CARBON COUNTY, WY

Decided: May 25, 2006

By petition filed on February 10, 2006, Wyoming and Colorado Railroad Company, Inc. (WYCO), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 23.71-mile line of railroad between milepost 0.57, near Walcott, and milepost 24.28, at Saratoga, in Carbon County, WY. Notice of the filing was served and published in the Federal Register on March 2, 2006 (71 FR 10755-56). A protest was filed by the Board of Carbon County Commissioners (Carbon County). We will grant the petition for exemption, subject to environmental, historic preservation, and standard employee protective conditions.

BACKGROUND

WYCO acquired the line from the Union Pacific Railroad Company (UP) in 1987. See Wyoming and Colorado Railroad Company, Inc.—Acquisition and Operation Exemption—Certain Lines of Union Pacific Railroad Company, Finance Docket No. 31140 (ICC served Nov. 30, 1987). WYCO states that the last active rail shipper on the line, Louisiana-Pacific Corporation (LP), operated a sawmill in Saratoga that was closed in January 2003, and no traffic has moved over the line since that date. WYCO asserts that, after it acquired the line, LP's traffic volumes were inadequate to fully compensate WYCO for the operation and maintenance of the line. Therefore, according to WYCO, LP agreed to enter into a series of annual "take-or-pay" contracts that permitted WYCO to operate the line on a marginally profitable basis. WYCO claims that, as LP's traffic moving over the line decreased over time, it agreed to lower the number of cars covered by the take-or-pay contract in an attempt to keep its sole customer on the line in business until, hopefully, traffic volumes increased. WYCO began the abandonment process in June 2003 but suspended its efforts when it learned that Intermountain Resources, LLC (IMR) was interested in purchasing and reopening the sawmill. WYCO submits, however, that the parties were unable to reach an arrangement that would enable WYCO to continue operating the line on a profitable basis. Assertedly, WYCO was informed that the sawmill would instead use the nearby transload facilities operated by UP at Rawlins, WY.

IMR purchased the sawmill on September 26, 2003, but has delayed reopening the plant. In a prior proceeding involving the same abandonment request,¹ IMR stated that it would be operating the sawmill by October 15, 2004, and that it expected to ship between 70 and 80 cars per month, with increases to between 95 and 120 cars per month after the facility was upgraded (approximately 6 months after reopening). In that proceeding, IMR argued that rail service from WYCO would be the only practical or economically feasible transportation alternative because the UP rail line in Rawlins is approximately 50 miles from the sawmill. Moreover, if rail service were not available, IMR submitted that it would have to acquire its own fleet of trucks because of the lack of commercial truckers that serve the area. There is no indication that the sawmill has reopened, and IMR has not filed a reply to this petition.

The Board denied WYCO's petition for an abandonment exemption in WYCO I because the exemption was opposed by five entities and because WYCO did not present any cost or other evidence to support its arguments that the line cannot be operated on a profitable basis, that it has incurred opportunity costs, that the line, when it was operated, did not generate sufficient revenues to allow for normalized maintenance and that, as a result, substantial costs would be incurred in resuming operations. The Board denied the petition without prejudice to WYCO's either refiling a petition for exemption or filing a formal abandonment application to provide specific evidence in support of its request.

In its current petition, WYCO provides operating costs, rehabilitation costs and the net liquidation value (NLV) for the line. No party contests these data. WYCO states that, in the base year (June 1, 2004-May 31, 2005), it did not transport any traffic. The line generated \$5,910 in lease revenue and incurred \$159,680 in avoidable costs, for an avoidable loss of \$153,770. For the forecast year, even if IMR commences operations of the sawmill at its projected rate of 80 cars per month at \$355 per car, WYCO predicts revenues of \$346,710 and avoidable costs of \$458,254, for a net loss of \$111,544.

According to WYCO, it has opportunity costs of over \$1,400,000 over the last 3 years, and the line has an NLV of \$3,655,455. WYCO claims that, to cover its operating costs and earn its cost of capital, IMR would have to make a subsidy payment of \$638,397 for the forecast year or guarantee WYCO 80 cars per month at \$1,020 per car. Moreover, WYCO contends that, even using the projections IMR gave to it originally, WYCO would still incur an annual operating loss of \$111,544 and incur opportunity costs of \$466,853 for a total economic loss of \$578,397.

WYCO asserts that it cannot maintain or operate profitably over the line, nor can it justify any future rehabilitation of or reinvestment in the line. It contends that the projected revenues from IMR, should IMR commence operation of the sawmill, together with its existing lease revenues, are insufficient to cover its avoidable costs, much less a return on value, opportunity costs, or rehabilitation costs, and no reasonably forecast

¹ Wyoming and Colorado Railroad Company, Inc.—Abandonment Exemption—In Carbon County, WY, STB Docket No. AB-307 (Sub-No. 5X) (STB served Nov. 10, 2004) (WYCO I).

increase in traffic could cover the deficit. The area traversed by the line is predominantly rural. Finally, WYCO notes that the Board and its predecessor have consistently rejected speculation about future traffic as a basis for denying the abandonment of an otherwise unprofitable rail line.

Carbon County opposes the petition for exemption, claiming that there are requests to use the line as a siding to handle materials for energy projects, a prospect that was not considered in WYCO I. It also states that the line is located at a midpoint within Carbon County and as such would be an asset to current and future economic development in the area.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption also will foster sound economic conditions and encourage efficient management by relieving WYCO from the expense of maintaining and operating a line that is not being used and by allowing WYCO to apply its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. No traffic has moved over the line in over 3 years, and there are no shippers remaining on the line. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

WYCO has submitted environmental and historic reports with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA

served an environmental assessment (EA) on April 11, 2006, requesting comments by May 11, 2006.

In the EA, SEA discussed concerns expressed by, or reviews not yet completed by, various agencies. Based on the record at that time, SEA recommended that four conditions be imposed on any decision granting abandonment authority.

In the EA, SEA noted that the National Geodetic Survey (NGS) has identified 18 geodetic station markers that may be affected by the proposed abandonment. Therefore, SEA recommends that WYCO provide NGS with at least 90 days' notice prior to beginning salvage activities in order to plan for the possible relocation of those geodetic station markers.

SEA also states in the EA that the Wyoming Department of Environmental Quality (DEQ) has indicated that two Water Quality Division permits may apply to the proposed abandonment: (1) a Temporary Discharge Permit under the National Pollutant Discharge Elimination Program; and (2) a Storm Water Associated with Construction Activities Permit if the abandonment results in clearing, grading, or otherwise disturbing one or more acres. DEQ also states that WYCO should take every effort to prevent erosion of any kind. Therefore, SEA recommends that, prior to the onset of salvage operations, WYCO be required to consult with DEQ concerning its Water Quality Division requirements and to comply with those requirements.

SEA further states in the EA that the U.S. Department of the Interior, Fish and Wildlife Service, Ecological Services Office (USFWS), in Cheyenne, WY, has indicated that three Federally endangered or threatened species which may require protective measures in accordance with the Endangered Species Act—the Bald eagle (*Haliaeetus leucocephalus*), the Black-footed ferret (*Mustela nigripes*), and the Ute ladies'-tresses (*Spiranthes diluvialis*)—may be present in or near the project area. USFWS also has concerns regarding the Greater sage-grouse (*Centrocercus urophasianus*) and indicates that specific protective measures may be appropriate for migratory birds in accordance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. Finally, USFWS suggests that WYCO avoid and minimize, to the greatest extent possible, impacts to any wetland areas, stream channels, and surrounding vegetation. Therefore, SEA recommends that, prior to the onset of salvage operations, WYCO be required to consult with USFWS concerning potential impacts to species of Federal concern that may occur in the vicinity of the line.

Finally, SEA states in the EA that the Wyoming State Historic Preservation Office (SHPO) has concluded that the proposed abandonment, as planned, would have no adverse effect on historic properties listed in or eligible for inclusion in the National Register of Historic Places. However, the SHPO is concerned that cultural materials may be discovered as work progresses. Therefore, SEA recommends that WYCO be required to halt work in the area immediately if any cultural materials are discovered during salvage operations, contact SEA and SHPO staff immediately, and have the materials

evaluated by an archeologist or historian meeting the Secretary of the Interior's Professional Qualification Standards.

In response to the EA, USFWS expressed concerns regarding potential adverse effects to the bald eagle. Therefore, SEA recommends that, in addition to the previous USFWS condition, WYCO maintain a disturbance-free buffer zone of one mile around eagle nests and winter roost sites or, if this buffer zone is not practicable, conduct no salvage activities between February 15 and August 15, to protect nesting birds, or between November 1 and April 15, to protect roosting birds, and report the results of the USFWS consultations to SEA in writing prior to the onset of salvage operations.

The conditions recommended by SEA both in the EA and in response to the comment filed after the EA was served will be imposed. Based on SEA's recommendations, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA has indicated in its EA that the right-of-way may be suitable for other public use under 49 U.S.C. 10905. Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by March 22, 2006. No one has sought a public use condition, and none will be imposed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by WYCO of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that WYCO: (1) notify the NGS at least 90 days prior to beginning salvage activities in order to plan for the possible relocation of 18 geodetic station markers; (2) prior to the onset of salvage operations, consult with DEQ concerning its Water Quality Division requirements and comply with those requirements; (3) prior to the onset of salvage operations, consult with USFWS concerning potential impacts to species of Federal concern that may occur in the vicinity of the line, maintain a disturbance-free buffer zone of one mile around eagle nests and winter roost sites or, if this buffer zone is not practicable, conduct no salvage activities between February 15 and August 15, to protect nesting birds, or between November 1 and April 15, to protect roosting birds, and, prior to the onset of salvage operations, report the results of the USFWS consultations to SEA in writing; and (4) halt work in the area immediately if any cultural materials are discovered during salvage operations, contact SEA and SHPO staff immediately, and have the materials evaluated by an archeologist or historian meeting the Secretary of the Interior's Professional Qualification Standards.

2. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by WYCO and the Board by June 9, 2006, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror

must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,200. See 49 CFR 1002.2(f)(25).

3. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

4. Provided no OFA has been received, this exemption will be effective June 30, 2006. Petitions to stay must be filed by June 15, 2006, and petitions to reopen must be filed by June 26, 2006.

5. Pursuant to the provisions of 49 CFR 1152.29(e)(2), WYCO shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by WYCO’s filing of a notice of consummation by May 31, 2007, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary